

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LIGHTNING 1179, LLC,

Plaintiff,

v.

FLORA E. RODRIGUEZ and NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD,

Defendants.

MARGO K. BRODIE, United States District Judge:

Plaintiff Lightning 1179, LLC (substituting original plaintiff Courchevel 1850 LLC)¹ commenced the above-captioned action on October 30, 2017, pursuant to New York Real Property Actions and Proceedings Law (“RPAPL”) § 1301, against Defendants Flora E. Rodriguez and the New York City Environmental Control Board (the “ECB”), seeking to foreclose on a mortgage encumbering the property commonly known as 105-38 171st Place, Jamaica, New York 11433 (the “Property”). (Compl. ¶ 10, Docket Entry No. 1; Am. Compl. ¶ 1, Docket Entry No. 17.) Plaintiff alleges that Rodriguez is the owner of the Property encumbered by the mortgage it is seeking to foreclose and alleges that the ECB is a defendant “by way of having filed liens and/or judgments against the . . . Property.” (Am. Compl. ¶ 6.) On September 16, 2019, former plaintiff Courchevel 1850 LLC moved for a default judgment seeking a judgment of foreclosure and sale and damages in the amount of \$118,504.75. (Pl.’s Mot. for

¹ On June 23, 2020, Plaintiff filed a letter motion to substitute Lightning 1179, LLC for the original plaintiff Courchevel 1850 LLC, pursuant to Rule 25(c) of the Federal Rules of Civil Procedure, based on Courchevel 1850’s transfer of interest in the note and mortgage to Plaintiff. (Pl.’s Mot. to Substitute Party, Docket Entry No. 36.) The Court granted the motion on September 16, 2020. (Order dated Sept. 16, 2020.)

Default J. (“Pl.’s Mot.”), Docket Entry No. 35; Pl.’s Mem. in Supp. of Pl.’s Mot. 4, Docket Entry No. 35-2.) On September 16, 2019, the Court referred the matter to Magistrate Judge Steven Tiscione for a report and recommendation. (Order dated Sept. 16, 2019.) By report and recommendation dated September 18, 2020, Judge Tiscione recommended that the Court grant the motion in part and deny it in part (the “R&R”). (R&R, Docket Entry No. 37.)

For the reasons set forth below, the Court adopts the report and recommendation and grants Plaintiff’s motion in part and denies it in part. The Court orders Plaintiff to provide additional information to support the damages claimed.

I. Background

In the R&R, Judge Tiscione recommended that the Court grant Plaintiff’s motion for default judgment in part against Rodriguez and deny Plaintiff’s motion against the ECB, and that the Court order Plaintiff to provide the Court with additional information on which to base its damages award. (R&R 1, 13.) Judge Tiscione found that Plaintiff pled *prima facie* compliance with section 1304 of RPAPL. (*Id.* at 9.) Judge Tiscione also determined that although Rodriguez alleged “several potentially meritorious affirmative defenses,” these affirmative defenses should be stricken because “Defendant has repeatedly failed to appear and defend this action” and the Court is not required or permitted to raise these affirmative defenses *sua sponte*. (*Id.*) Regarding Defendants’ liability, Judge Tiscione found that Plaintiff made an adequate showing of liability on a New York mortgage foreclosure action as to Rodriguez because Plaintiff produced a valid mortgage, note, and proof of default, but not as to the ECB because Plaintiff failed to show the ““particular nature of the interest in or lien on the real party and the reason for making [the ECB]’ a party to the action.” (*Id.* at 10–11 (quoting RPAPL § 1311(3)).) Judge Tiscione also recommended that the Court direct Plaintiff to provide additional

information on which to base its damages award because Plaintiff failed to provide “any accounting of *how* the outstanding principal balance was calculated” and failed to allege the number of payments made by Rodriguez. (*Id.* at 13.) Judge Tiscione found that there were inconsistencies in the record, including a deviation in the outstanding principal balance claimed by Plaintiff in this action and in a prior action instituted by Plaintiff against the same Defendants involving the same underlying allegations. (*Id.* at 13–14.)

No party has objected to the R&R and the time for doing so has passed.

II. Discussion

A district court reviewing a magistrate judge’s recommended ruling “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C). “Where parties receive clear notice of the consequences, failure to timely object to a magistrate’s report and recommendation operates as a waiver of further judicial review of the magistrate’s decision.” *Smith v. Campbell*, 782 F.3d 93, 102 (2d Cir. 2015) (quoting *Mario v. P&C Food Markets, Inc.*, 313 F.3d 758, 766 (2d Cir. 2002)); *see also Almonte v. Suffolk Cty.*, 531 F. App’x 107, 109 (2d Cir. 2013) (“As a rule, a party’s failure to object to any purported error or omission in a magistrate judge’s report waives further judicial review of the point.” (quoting *Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003))); *Sepe v. N.Y. State Ins. Fund*, 466 F. App’x 49, 50 (2d Cir. 2012); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010) (“[A] party waives appellate review of a decision in a magistrate judge’s [r]eport and [r]ecommendation if the party fails to file timely objections designating the particular issue.”).

The Court has reviewed the unopposed R&R and, finding no clear error, adopts the R&R pursuant to 28 U.S.C. § 636(b)(1).

III. Conclusion

Accordingly, the Court strikes Defendant's answer and grants Plaintiff's motion for a default judgment against Rodriguez. The Court denies Plaintiff's motion for a default judgment against the ECB. The Court orders Plaintiff to provide additional information on which to base its damages award.

Dated: October 13, 2020
Brooklyn, New York

SO ORDERED:

s/ MKB
MARGO K. BRODIE
United States District Judge